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Supreme Court of the United States

OCTOBER TERM, 1958

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioners

v.

DAIRY DISTRIBUTORS, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Utah, affirming a judgment against petitioners and in favor of plaintiff for $100,000 granted by the Third District Court of Utah in and for Salt Lake City for alleged violations of Section 303 of the Labor-Management Relations Act of 1947.

OPINION BELOW

The opinion of the Supreme Court of Utah is reported in 329 P. 2d 414, but is not yet reported in the Utah Reports. A copy of such opinion is attached to this petition as Appendix "A". See also R.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on September 5, 1958, and a Petition for Rehearing, making such judgment final, was denied on January 26, 1959. The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257(3), the court below having improperly construed and applied various sections of the Labor-Management Relations Act of 1947 and particularly Sections 301(e)

and 303 thereof, (61 Stat. 136, 29 U.S.C., § 151, et seq.) in a manner such as to deprive petitioners of rights protected under such statute and under the Federal Constitution and in a manner contrary to applicable decisions of this Court, the federal Circuit Courts of Appeal, and the National Labor Relations Board, all as more fully set forth hereinafter in this petition.

QUESTIONS PRESENTED

1. Whether the affiliation of a local union and a joint council of local unions with a regional labor organization and an international labor organization suffices in itself to establish the responsibility of the regional and international labor organization for the acts of agents of the local union and joint council under the provisions of Section 303(a) of the Labor Management Relations Act, 1947, which makes "unlawful" certain conduct on the part of a "labor organization," and particularly under Section 301(e) of that Act, which provides that a person shall be responsible for the acts of another only if that other is his agent and acting as such.

2. Whether, under the circumstances of this case, the single day of picketing activities which formed the basis for the claim herein of a violation of Section 303(a) of the Labor Management Relations Act, 1947, did in law violate that section where, in one instance, it was not shown that any employees, as distinguished from an employer, were induced to refuse to unload, and where, in the other instance, there was no evidence other than the bare fact of the picketing itself that the picketing was intended to induce a refusal to unload and the picketing did not result in any such refusal.

3. A carrier had been in business for about two and one-half years, its business was dependent upon one customer with whom it had no contract, and it had been earning about $1,000 a month but was currently losing money. Alleged

secondary picketing of the carrier's customer took place for about an hour-and-a-half on one day only. The question presented is whether Section 303(b) of the Labor Management Relations Act, 1947, which provides for the recovery of money damages by "Whoever shall be injured in his business or property by reason of any violation" of Section 303(a), permits a judgment of $100,000 in favor of the carrier for the "destruction" of its business by such picketing where (1) the carrier did not invoke the offices of the National Labor Relations Board to secure a cessation of the picketing; (2) the picketing was not the reasonably certain cause of the carrier's decision to discontinue its business; (3) the damages assessed were remote, speculative and excessive; and (4) the Court wrongfully applied Federal law under the Interstate Commerce Commission Act, thereby depriving petitioners of the defense that respondent, illegally operating without an ICC permit, could not recover for loss of future profits.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are Sections 303, 2(13) and 301(e):

"Sec. 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to

recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognized under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

"Sec. 301(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT

A. The Facts

The respondent, Dairy Distributors, Inc., plaintiff below, a trucking company, located in Amalga, Utah, formed d owned by one Gosner and his family (R. 12, 13). The id Gosner also operated in Utah a cooperative associa- n of milk producers known as the Cache Valley Dairy- en's Association and undertook to manufacture and dis- bute cheese for that Association (R. 8). The principal siness of the respondent trucking company was to pur- ase cheese from the Association and truck it to New York ty where it was sold principally to one N. Dorman and mpany, a wholesale cheese dealer there. (R. 86). Re- ondent would then purchase back-haul commodities ainly calcium chloride) in New York or elsewhere in the st for trucking back to Utah for sale there. (R. 15, 83). is operation was conducted without an ICC permit. . 84).

Petitioner Local Union 976 is a local union representing ucking employees, functioning in the Ogden and northern tah area, and is affiliated with the petitioner International otherhood of Teamsters, Chauffeurs, Warehousemen & elpers of America (R. 116, 123). For some years it had llective bargaining relationships with the Association, t upon termination of the 1952 contract, negotiations for newal thereof failed and a strike ensued (R. 177), in con- ction with which the Association was cited by the Na- onal Labor Relations Board for refusal to bargain in good ith (R.115).

In an effort to bring the dispute to a head and obtain a llective agreement, one Rash, the Secretary-Treasurer of titioner Local 976, enlisted the aid of a representative ne Lott) of petitioner Joint Council 67, together with an mployee of the Western States Dairy Council by the name

of Ballew,[1] and in May of 1955 the three proceeded to New York for the express purpose of urging Dorman to use whatever influence and pressure he could to require the Association to bargain in good faith with Local 976 (R. 114, 127, 143, 145, 148, 337).

While in New York on the above mission, Rash, Ballew and Lott contacted a representative (one Ristuccia) of Teamsters Local Union 277, a New York City local union, which had collective bargaining relationships with Dorman, Dorman's employees being members thereof. Ristuccia joined with Rash, Ballew and Lott in orally urging Dorman to refuse to deal with the Association until bargaining was resumed, implying that it would be in Mr. Dorman's interest as a matter of good labor relations to cooperate in prevailing upon the Association to bargain (R. 337).

Early on the morning of July 26, 1955, one of respondent Dairy Distributors' trucks pulled up to the Dorman loading platform with a load of Association cheese (R. 131). The truck shortly afterward was picketed by Rash and Lott who carried signs reading as follows:

> "NOTICE, THE CHEESE CARRIED AND DELIVERED BY THIS TRUCK HAS BEEN WORKED AND PROCESSED BY NON-UNION EMPLOYEES OF THE CACHE VALLEY DAIRY ASSOCIATION, SMITHFIELD, UTAH. TEAMSTERS JOINT COUNCIL NO. 67." (R. 138)

Before the picketing commenced that morning, however, Rash and Ballew talked to Dorman's foreman and manager,

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[1] Petitioner Joint Council 67 is a council or association of Teamster Local Unions in the Salt Lake City area. The record shows only that the Western States Dairy Council is "connected with" (R. 142) the petitioner Western Conference of Teamsters, which petitioner is an association of Teamsters Locals and Joint Councils in the eleven Western states and is an affiliate of petitioner International Brotherhood of Teamsters. All of these labor associations are separate entities functioning autonomously (R. 113, 116, 123, 125).

one Rosen, who was a member of Local 277, (R. 111, 112, 130, 131, 132, 136, 234, 235) and told him they had the permission of the New York Local to picket, and asked Rosen's cooperation (R. 131, 132). Rosen refused to permit the truck to be unloaded until such time as he could learn what the New York local union's and Dorman's desires were. (R. 132). The record does not show that any of Dorman's unloading employees were present during the early morning picketing. In the meantime, Rash and Lott had commenced picketing the truck at Dorman's loading platform, and this picketing at the platform lasted somewhat less than an hour in all. Dorman appeared about an hour after the pickets had first appeared and instructed Rosen not to permit the unloading of the truck (R. 132, 244). Later that afternoon, after Dorman had contacted the New York Teamster Local and learned that it was not preventing the unloading, (R. 267), he ordered the truck to be unloaded, whereupon it was unloaded by a member of Rosen's crew known as Nigro in spite of the picketing which had been resumed by Rash and Lott who picketed about a hour during the unloading (R. 87 and 267). Nigro was the only Dorman employee shown to be present that afternoon.

Respondent Dairy Distributors next brought cheese to Dorman's platform on September 7, 1955. There was no picketing, but Dorman refused to unload the cheese, the record not disclosing his reasons other than that he wanted to go along with the New York local union. (R. 25, 90, 152).

Respondent Dairy Distributors next brought cheese to Dorman's platform on October 31, 1955. At that time the truck was picketed by a picket unidentified in the record and bearing an undescribed picket sign. In spite of such picketing, the truck was unloaded by Dorman and his crew (R. 16, 26).

Respondent Dairy Distributors had no contract with Dorman for the purchase, sale or delivery of cheese for any present or future period (R. 289). After the October 31,

1955, incident, it made no further attempt to sell or deliver cheese to Dorman but, instead, liquidated its business. The record does not show precisely why the business was liquidated but there is evidence that it was done by mutual consent and because of Dorman's reluctance to deal with a supplier engaged in a labor dispute and thus incur the displeasure of his employees (R. 89, 299). In addition, there was undenied evidence that the respondent had been losing money for several months prior to the picketing (R. 240). Although there was some showing of a threat by Local 976 to picket respondent's trucks at any time Local 976 felt like it, there was no showing that prior to liquidation of its business respondent had sought the services of the National Labor Relations Board under Section 8(b)(4) and 10 of the Taft-Hartley Act to obtain an injunction against any alleged illegal picketing by any of the petitioners herein, and it was admitted (R. 298) that "There was never a Dairy Distributors' truck that was brought up to your [Dorman's] dock that wasn't unloaded the same day it got there."

B. The Proceedings Below

On the basis of the foregoing activities, the respondent Dairy Distributors brought an action in the District Court of the Third Judicial District of Utah in and for Salt Lake County for $125,000 damages, alleging destruction of its business by reason of the above picketing activities. (R. A1). The action was founded entirely upon Section 303 of the Labor-Management Relations Act, as amended, and particularly sections 303(a) 1 and 2 thereof. Petitioner Western Conference of Teamsters and petitioner International Brotherhood of Teamsters were joined as defendants, but specific activities on their part were alleged. The defendants filed answers denying the allegation of the complaint. (R. A12).

The trial was had in October of 1957 before an eight-man jury. At the trial the facts as set forth above were proved.

The plaintiff, (respondent Dairy Distributors here) introduced no evidence showing any authorization, participation or ratification by petitioners Western Conference and International Brotherhood in respect to the activities of the agents of petitioners Local 976 and Joint Council 67 as set forth in the above recital of facts, other than the bare fact that petitioner Local 976 and Joint Council 67 were affiliates of the Western Conference and International Brotherhood of Teamsters, and the payment of per capita taxes between such affiliates. There was evidence that petitioner Local 976 had been placed under "trusteeship" by the petitioner International Brotherhood of Teamsters, with one Jack Annon, of Los Angeles, appointed as "trustee", but there was no evidence of what the trusteeship consisted, or of Annon's participation in any of the affairs of the Local or its alleged illegal activities. On the contrary, there was undisputed evidence that Annon had never in his life been in Amalga where Dairy Distributors and the Dairymen's Association were located, or in Ogden where Local 976 was located. And that the local conducted its own affairs. The evidence showed only that Ballew was an employee of the Western States Dairy Council, not of the Western Conference or of the International Brotherhood. Finally, the evidence showed that Local 976 and Joint Council 67, as well as the Dairy Council, functioned as separate autonomous entities apart from the Western Conference and the International Brotherhood of Teamsters. (R. 116-127).[2]

In respect to damages, plaintiff admitted the lack of any contract for purchase of cheese between it and Dorman for any period in the past or future, and did not deny statements attributed to it of a loss in business during the

[2] All of the evidence respecting any agency relationship between petitioners Local 976 and Joint Council 67 on the one hand and petitioners Western Conference and International Brotherhood of Teamsters on the other, and any participation, authorization or ratification in the activities of the former two petitioners by the latter two petitioners, is contained in pp. 116 through 127 of the Record and is attached hereto as Exhibit "B".

period immediately preceding the July, 1955, picketing, but asserted an average monthly profit of $1,000 for its two and one-half years of dealings with Dorman.

At the close of plaintiff's case, as well as at the close of the entire case, defendants moved for a verdict in their favor, on the grounds that no violations of Section 303 had been shown and on the grounds, as for as the defendants Western Conference and International Brotherhood were concerned, that there was no showing of participation in or authorization or ratification by them of any of the alleged unlawful activity (R. A37-40), which motions were overruled and the case permitted to go to the jury. The jury returned a verdict against all of the defendants (the petitioners here) in the amount of $100,000 (R. A31) and Judgement was entered thereon (R. A36).

Thereafter, the defendants below filed appropriate motions for judgment in their favor, notwithstanding the verdict, and for a new trial, which motions were denied (R. A37-40, A44, A43, A52).

The case was then appealed to the Supreme Court of Utah, the defendants below (petitioners here) assigning as error plaintiff's failure to establish a case against any of the defendants under Section 303 of the Labor-Management Relations Act, the insufficiency of the evidence to impose liability upon defendants Western Conference and International Brotherhood, and the error of the court below in refusing to direct verdicts in their favor and to set aside the judgment. (R. A47, A53 and see briefs of appellants).

Question 1 above is discussed in appellants' brief, pages 70-87. This matter is also discussed in the appellants' rehearing brief, pages 27-54 as to both Western Conference and International and is also further discussed in the appellants' reply brief, pages 23-28. See also the last print for request for new trial.

Question 2 above is discussed in appellants' brief 1-6 and in their hearing brief, pages 1-7.

Question 3 above is raised at R231-2 and page 350; also in appellants' brief at pages 88 and 104 and also in their rehearing brief in the most of the pages following page 54.

The Supreme Court of Utah affirmed the judgment below, two of the five justices concurring in the results only. (R. A56). A copy of that court's opinion is attached hereto as Exhibit "A".

To petitioners' argument that there was no evidence linking petitioners Western Conference and International Brotherhood with the alleged illegal activities, the court below referred to the bare fact of affiliation and the payment by Local 976's members of part of their dues to the International, and concluded that Section 301(e) of the Taft-Hartley Act supported an agency or participation finding on the basis of the foregoing circumstances alone.

To petitioners' argument that there was no evidence of an inducement of Dorman's *employees*, as distinguished from Dorman himself or his supervisor Rosen, to refuse to unload respondent's cheese from respondent's trucks, and that any such refusal resulted from the directions of Dorman or his supervisor acting in cooperation with the New York Teamsters Local, the court below replied that "To contend so is to challenge the silent potency of a peaceful picket line, and is to ignore the very purpose of such a line: Persuasion.", but the court pointed to no evidence, nor could it, that the refusal to unload was the result of anything but Dorman's and Rosen's instructions.

In reply to petitioners' argument that the evidence supporting damages was speculative and showed no causal connection between any activities illegal under Section 303 and damages suffered by reason thereof, the court stated that there was sufficient to take the case to the jury, and that although there was no contract between plaintiff and Dorman for the purchase of cheese for any period, nevertheless "there had been continuous contractual sales and purchases between plaintiff and Dorman's for better than

two years. The evidence shows that the Dormans wanted deliveries and plaintiff wanted to continue to make them, and it appears that such an extended business relationship at least presumptively would have prevailed indefinitely had it not been for the unauthorized picketing."

Following such decision, petitioners herein (defendants below) filed a petition for rehearing and brief in support thereof, further questioning the court's construction and application of Sections 303 and 301 of the Labor-Management Relations Act, and urging deprivation of rights guaranteed by the statute and by the Federal Constitution. This petition for rehearing was denied by the Supreme Court of Utah on January 26, 1959 (R. A55).

REASONS FOR GRANTING OF WRIT

I.

This case involves important questions of the interpretation and application of Sections 303 and 301(e) of the Labor-Management Relations Act of 1947 in suits brought in the state courts under Section 303(b) of that Act. This is the first case to reach this Court in which a court of last resort of any state has attempted to interpret and apply the foregoing sections of that Act.

As will be demonstrated shortly, the court below has applied and interpreted those sections of the Act in a manner contrary to interpretations and applications of companion sections of the Act—namely, 8(b)(4) and 2(13)—made by this Court, by the Circuit Courts of Appeal, and by the National Labor Relations Board. Thus, the court below has found an agency relationship to exist between a national and regional labor organization and their local

affiliates and has imposed liability on the former for activities of the latter solely on the bare fact of such affiliation, relying on Section 301(e) for such holding. Such a determination is directly contrary to decisions of this Court and of the lower Federal courts and of the National Labor Relations Board. The court below has found a violation of the secondary boycott prohibitions of Section 303 for union activities which this Court and other judicial and administrative tribunals have said do not constitute a violation of Section 8(b)(4). Finally, the court below has allowed heavy damages to stand under Section 303 for alleged "destruction" of a business under circumstances where the termination of such business was not the clear and certain result of the alleged violation of Section 303(a), and the injuries claimed were not shown to be occasioned "by reason of" the alleged violation as required under Section 303(b), and where the damages awarded were clearly remote, speculative and excessive. By so doing, the court below has not only construed and applied a Federal Act in an erroneous manner and in disregard of applicable decisions of this and other Federal Courts, so as to require correction here, in addition, it has seriously damaged petitioners herein and deprived them of property without due process of law, and has created precedents under which other labor organizations can be similarly damaged.

The issues presented in this case can be resolved only by this Court, and any error in the court below in applying the Federal law can be corrected only by this Court. The questions of Federal law decided by the state court are of sufficient substance to warrant review here; use of Section 303 in other state courts in the same manner that section was used in the court below could well bankrupt the labor movement. In the interest of correcting such errors, in the interest of uniform interpretation and appli-

cation of the Taft-Hartley Act in litigation before the National Labor Relations Board and in the Federal and state courts, and in the interest of avoiding precedents which can have adverse consequences to all of organized labor, it is respectfully submitted that this Court should assume jurisdiction to determine the questions which are presented in this petition.

II.

1. The court below erred in holding the Western Conference and the International Brotherhood responsible under Section 301(e) for the alleged unlawful picketing.

The picketing in this case which was found below to be unlawful and in violation of Section 303, and on which respondent predicated his cause of action, was engaged in by Rash and Lott with the assistance of Ballew. Rash and Lot were officers and paid representatives of Local Union 976 and Joint Council 67, respectively and Ballew was a paid representative of the Western States Dairy Council which is a council of local unions in the dairy field referred to by the court below as "a Seattle labor agency." The court below found that Ballew had been loaned by that agency "to assist Local 976 in its negotiations." The record shows that Rash, Lott or Ballew were not employed by or officers of either the Western Conference or the International Brotherhood. As to the relationship between Local Union 976, Joint Council 67 and Western States Dairy Council on the one hand, and the Western Conference and the International Brotherhood on the other, the record shows only that the Local Union and the Joint Council were "affiliated with" the Western Conference and the International

Brotherhood, and paid per capita taxes to the latter.[4] The Dairy Council is described only as "connected with" the Western Conference. The record affirmatively shows that both Local Union 976 and Joint Council 67 were autonomous bodies operating independently from either the Western Conference or the International Brotherhood.

Under the foregoing circumstances, it is clear that neither Rash, Lott, Ballew, Local Union 976, the Joint Council 67 nor the Dairy Council were agents of either the Western Conference or the International Brotherhood. The above individuals were employed by and acting solely for organizations other than the Western Conference and the International Brotherhood, and were not employees, representatives or officers of the latter two organizations. Nor were the local organizations agents of the Western Conference or International Brotherhood. It is settled that an agency cannot be found on the mere fact of affiliation and payment of dues or per capita taxes as between the local bodies and the Western Conference of the International Union. This Court long ago so held in *United Mine*

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[4] The record further shows that the International Brotherhood had appointed one Jack Annan as "Trustee" of the Local and had placed the Local under "trusteeship," but the record is entirely silent as to what such trusteeship consisted of and the relationship between the International and the Local under the trusteeship. On the other hand, the record discloses that Annan, altho a "trustee," took no part in the affairs of the Local, had never been in the Local's offices or the city where the Local was located and knew nothing of the dispute between the Local and respondent. The record further shows that the Local functioned autonomously through its own officers, although nominally under a "trusteeship." The terms "trustee" or "trusteeship" have no such established meaning in the law as to impute an agency relationship, absent proof of the nature of the trustee relationship.

Workers v. Coronado Coal Co., 259 U.S. 344; *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295.[5]

Since the alleged illegal picketing was not engaged in by any agent of the petitioners Western Conference or the International Brotherhood, such petitioners could be held liable for that picketing only if they authorized or ratified it; there is, of course, no contention or attempt to show that such petitioners directly participated in the alleged unlawful acts.

The court below found authorization, ratification, and agency by virtue of the provisions of Section 301(e) of the Act. Section 301(e) of the Act, after providing for responsibility only where there is an actual agency, states that in determining agency or responsibility for the acts of others, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[6] Section 301(e), as well as its exact counterpart Sec. 2(13), are Taft-Hartley amendments to the Wagner Act which, although they were designed to permit greater leniency in finding agency relationships under the Act, were not designed to do away with the common law rules of agency. The legislative history and court and Labor Board decisions thereunder so indicate. See *Garment Workers Union v. N.L.R.B.*, 225 F 2d 923.

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[5] Where the point has been considered by the lower Federal Courts or the National Labor Relations Board, those bodies have likewise held that an International Union is not *ipso facto* responsible for the acts of its subordinate bodies, and the latter is not necessarily the agent of the former, in the absence of some showing of actual participation, authorization or ratification. See, for instance, *Di Giorgio Fruit Corporation v. NLRB*, 19 F 2d 642; *United Construction Workers v. Haislip Baking Company*, 223 F 2d 872; *Mile Brach Coal Co. v. United Mine Workers* (U. S. Dist. Ct., D.C.), 162 Fed. Supp. 65, 42 LRRM 2169, and *In the Matter of International Brotherhood of Electrical Workers and Franklin Electric Construction Co.*, 121 NLRB No. 26, 42 LRRM 1301, and authorities cited therein, f.n. 3.

[6] Section 303(b) provides that suits under Section 303(a) are "subject to the limitations and provisions of Section 301 hereof."

Here, there was no showing or even any attempt to show that either the Western Conference or the International Brotherhood as such had in fact either authorized or ratified the illlegal picketing. To find such authorization or ratification, as well as to find agency, both respondent and the courts below relied entirely upon the bare fact of affiliation as discussed above.[7] There are no Federal cases which have applied either Section 2 (13) or Section 301(e) to establish responsibility in an international or regional union for acts of a local affiliate solely on the basis of such affiliation, and as seen from the discussion above, the courts have held to the contrary as a general rule of agency. The Ninth Circuit decision (*ILA Local 8 v. Hawaiian Pineapple Co.*, 226 F 2d 875) and the Fourth Circuit decision (*United Mine Workers v. Patton*, 211 F 2d 742) relied on by the court below involve either a situation in which the individual committing the unlawful act was admittedly an agent, although the principal did not know of the agent's activities, as in the Longshoreman's case, or else in which there was direct participation by the international union through one of its field representatives, as in the Mineworkers case.

It is apparent that the court below has grievously misapplied Section 301(e) to impute responsibility to the Western Conference and the International Brotherhood, and further has ignored the decisions of this Court as well as other Federal courts applying rules of agency both at common law and under the Taft-Hartley Act. To allow this precedent to stand is to provide a ready means for the bankrupting of all national unions by fixing responsibility upon them, through affiliation alone, for every unlawful activity of their numerous local subordinate bodies —activity concerning which, as here, the national union may have had no knowledge.

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[7] All of the evidence in the record respecting an agency relationship or bearing on the question of authorization or ratification is set forth in Appendix B, attached to this petition.

2. There is no showing that any picketing in this case violated Section 303.

The court below has misapplied Section 303(a) and has again ignored decisions of this Court, of Federal courts of appeals and of the National Labor Relations Board in finding a violation of Section 303 under the facts of this case. The record fails to disclose the presence of several elements in the July 26 picketing essential to a Section 303 violation.[8] Although Section 303 requires an inducement of *employees* as distinguished from *employers*, to refuse to handle or unload, the hour or less of picketing in the morning did not induce any *employees* to refuse to unload the truck, the failure to unload being solely the result of orders from the employer Dorman and his manager or supervisor, Rosen.[9] This Court, as well as various of the Federal Circuit Courts of Appeals, has held under Section 8(b)(4)—the counterpart of Section 303(a)—that it is *employees* who must be induced to strike or refuse to handle goods; inducements, pressures, or even threats of strike directed against *employers* are not in violation of that Act even though such activities might cause that employer to refuse to handle the goods of some other employer. In *Local 1976 Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, this Court held as follows:

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[8] It must be remembered that we are here concerned only with the picketing which took place on the morning and afternoon of July 26. The only other attempts to deliver took place on September 7 and October 31. There was no picketing during the September delivery and there was no unloading then solely because of Dorman's instructions to that effect. While there was picketing at the time of the October delivery, there was no attempt to show the nature or purpose of that picketing or even by whom it was carried on, and in any event, the picketing was ineffective, the truck being unloaded without interruption.

[9] Sections 2(3) and 2(11) make clear that any person employed as a "supervisor" is not an "employee" as that term is used in the Act. Appeals to such supervisors, or even threats accompanied by actual picketing, do not constitute a violation of the Act where employees as such are not induced to quit work. *Rabouin v. N.L.R.B.*, 195 F 2d 906.

"The section does not speak generally of secondary boycotts. It describes and condemns specified union conduct directed to specific objectives. It makes it an unfair labor practice for a union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party. *Employees must be induced; they must be induced to engage in a strike or concerted refusal;* an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited. *A boycott voluntarily engaged in by a secondary employer for his own business reasons,* perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. *Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees . . . The primary employer, with whom the union is principally at odds, has no absolute assurance that he will be free from the consequences of a secondary boycott. Nor have other employers or persons who deal with either, the primary employer or the secondary employer and who may be injuriously affected by the restrictions on commerce that flow from secondary boycotts. Nor has the general public.*" (Emphasis added).

See also *Rabouin v. N.L.R.B.*, 195 F. 2d, at 908; *Schatte v. International Alliance*, 182 F. 2d 158, cert. denied 340 U.S. 827.

Dorman or Rosen may well have been influenced to refuse to unload the truck because of fear of jeopardizing Dorman's relationship with Local 277, but such a refusal induced for such a reason does not violate the Act. Only if Dorman's employees, over Dorman's objections or orders, had refused to unload because of the picketing, would a vio-

lation of the Act have taken place, and there is no evidence in the record to show that this took place.

While it appears that there was an employee of Dorman (Nigro) present during the half-hour or so of picketing on the afternoon of July 26, there is nothing in the record to show, other than the bare fact of the picketing itself, that the picketing was designed to induce Nigro or any other employee to refuse to unload the truck, and the picketing did not, in fact, induce any refusal to unload because the truck was unloaded without interruption in spite of the picketing. The picket sign itself merely brought to the public's attention the fact that the product carried in the truck had been produced under unfair conditions. There was no showing of any direct or indirect solicitation of any employee to refuse to unload the truck, other than the mere display of the picket sign, and that display was completely ineffective. Under such circumstances, it is error to indulge in inferences, as did the court below, based upon the *per se* or inevitable effects of a peaceful picket line or its "silent potency," particularly where the picketing does not in fact operate to induce any refusal to handle or to unload. In *N.L.R.B. v. Local 50, Bakery Workers*, 245 Fed 2d 542, the Court held:

> "In the first place, we do not agree that the fact of picketing alone, absent supporting evidence of the surrounding circumstances, should raise any presumptions as to the intent or probable consequence of the picketing. In every case, the issue is whether the picketing is likely to induce a work stoppage in the particular context in which the picketing takes place and there must be some independent evidence supporting the inference of inducement, in addition to the fact of picketing. Any presumptions about consequences from the fact of picketing seem to us to be inconsistent with the approach taken in *NLRB v. Business Machines*, supra. See 228 F.2d at 560, 37 LRRM 2219.
>
> "Moreover, the context in which this picketing occurred, shows clearly that a work stoppage was not the

'natural and probable consequence' of this picketing. Nothing said by the pickets, or by the placards after the November 15 certification, urged the Arnold employees or any others to go on strike. Moreover, no employee failed to cross the picket line or ceased work."

It is true that there is an abundance of evidence that the purpose of the visit of Rash, Lott and Ballew to New York was to induce Dorman to bring pressure upon the respondent, even to the extent of refusing to do business with the respondent, but, as we have seen, this is not illegal, even though accompanied by threats and even though successful. It is apparent that the court and jury below have transformed the legal act of inducement of an employer to refuse to deal into an illegal inducement of employees. On the state of the record before it, this should not have been permitted. The court below has misapplied Section 303.

3. The damages awarded respondent did not arise "by reason of" a violation of the Act as is required by Section 303(b), were not the certain result of the alleged wrong, and, in any event, were speculative and excessive.

Section 303(b) permits recovery only for injuries caused "by reason of" the violation of the provisions of Section 303(a). The quoted language was presumably inserted by Congress in accordance with the common law which requires some showing of proximate cause between alleged illegal act and damages claimed. *Ketterer v. Armour and Co.* (CCA 9), 247 F 921; *Carolina Telephone and Telegraph Co., Inc. v. Johnson et al.*, 168 F 2d 489.

In applying Section 303(b), the court below is bound by the rule which precludes the recovery of uncertain damages, that is, damages which "are not the certain result of the wrong." *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555 at 562. "Certainly in the fact of damage is essential." *Palmer v. Connecticut R. & L.*

Co., 311 U. S. 544 at 561; see also *Bigelow v. RKO Radio Pictures*, 327 U. S. 251.

The requirement of the Fourteenth Amendment that no property be taken without due process of law permits this Court to inquire into and strike down judgments of state courts that are purely arbitrary or "in conflict with those fundamental principles which have been established in our system of jurisprudence for protection of private rights." See *American Railway Express v. Kentucky*, 273 U.S. 269; *Roberts v. New York*, 295 U.S. 264. Particularly when a state court attempts to apply Federal law, this Court will examine the record and determine whether, as a matter of law, there is enough evidence to support a finding of culpability, and to see whether there is any substantial evidence in support of the judgment. *Chicago G.W.R. v. Rambo*, 298 U.S. 99. See also *U.S. Gas Public Service Co. v. Texas*, 303 U.S. 123, and *Fisk v. Kansas*, 274 U.S. 380.

In the present case, it cannot be said that the "destruction" of respondent's trucking business was the certain result of the July 26 picketing incident, even if that picketing be deemed illegal, nor that the damages awarded occurred "by reason of" such picketing as required by Section 303(b). To say that a single incident of picketing, which did not prevent the truck from being unloaded and which was not repeated, caused the permanent shutting down of respondent's trucking business is preposterous, particularly where future deliveries were accepted in spite of picketing by unidentified pickets and where the operator of the trucking business failed to use a ready means available to prevent any future illegal picketing, namely, by application to the National Labor Relations Board for an injunction.[10]

[10] The rule is that one who claims injury is bound to exercise reasonable care to avoid or minimize loss, and to the extent that his damages are due to his failure to exercise such care, he cannot recover. *Chesapeake and Ohio Railroad v. Kelly*, 241 U.S. 485; *U. S. v. U.S. F and G Co.*, 236 U.S. 512.

While there might have been threats to continue the picketing in the future, that in itself does not constitute a violation, and in any event, as just noted, the respondent has a clear remedy to prevent future unlawful picketing which he failed to pursue and which, if he had pursued, would immediately have eliminated the potential damage to future operations for which petitioners are now being assessed.

The only certainty in the record as to what caused the "destruction" of respondent's business is either that Dorman was induced to discontinue his informal dealings with respondent (there was no contract between them for deliveries), by representatives of Local Union 976 or Joint Council 67, which, of course, does not give rise to a claim for damages under Section 303, or that, as is most likely from the record, respondent discontinued his business by mutual agreement between him and Dorman, Dorman not wishing to prejudice his labor relations with his employees, and respondent wishing to pursue his dispute with Local 976, which likewise would not give basis for a damage claim under Section 303.

It is submitted that the court below erred in disregarding the rule of this Court that any damages must be the certain result of the alleged wrongdoing, and in ignoring the requirement of Section 303(b) that the injury claimed must be the "result of" the alleged violation. The question of damages for the claimed "destruction" of respondent's business by the July 26 picketing should never have been submitted to the jury. The issue is an important one in the application of Section 303 in the state courts.

There is further error in the matter of damages. Considering the nature and state of respondent's business, the damages returned by the jury were palpably speculative and excessive. The record discloses a trucking business dependent on one customer with whom there was no contract for present or future deliveries. The business operates on a slim—considering the yearly gross—profit margin of

$1,000 per month, and was losing money the last few months before the picketing. For the alleged "destruction" of that business, the jury was permitted to return a verdict of $100,000, based entirely on loss of expected profits. The rule is, however, that it must be shown that any such profits could reasonably have been realized except for the picketing in question, and their loss must be the direct and necessary result of the defendant's wrongdoing. *Wells v. National Life Association*, 99 F 222; *Ohio-West Virginia Company v. Chesapeake and Ohio Railroad*, 97 West Virginia 61, 124 S.E. 587, 38 ALR 1439. Where it is uncertain whether any profit at all would have been made by the plaintiff, there can be no recovery for loss of profits. *Denning v. Sun Crest Lumber Co.*, 51 F 2d 945. Here, where there was no certainty that any profit would be realized, or no assurance that the relationship between respondent and Dorman would be continued for any certain time in the future, damages for profits must necessarily be based on speculation, and, in view of the record herein, are obviously excessive and should have been set aside for those reasons if, indeed, the issue should have been permitted to go to the jury at all.

A final gross error below going to the issue of damages is this. In the face of an admission by respondent carrier that it operated without an Interstate Commerce Commission permit, and in the face of applicable Federal decisions that the nature of respondent's trucking business was such as to require an ICC Permit under Federal law (*Stickle Company vs. Interstate Commerce Commission* (10th Cir.) 128 Fed. (2d) 155; certiorari denied, 317 U.S. 650; 63 S. Ct. 46, 87 L. Ed. 523; *Scott vs. Interstate Commerce Commission*, 213 Fed. 300) the Court below found that such respondent was not operating contrary to Federal law. As a result petitioners were deprived of their right to assert as a defense to the claim for damages herein the universally

accepted proposition that loss of profits may not be considered as an element of damages, where the business from which they would have resulted was, or would have been, conducted in violation of law *Kauffman v. Babcock*, 2 SW 878, *Kane v. Johnston* 9 Bosw. 154, 52 L.R.A. 66, *Raynor v. Valentin Blatz Brewing Company*, 100 Wisc. 414, 76 NW 343; *Jacques v. Bridgeport Horse Railroad Company* 41 Conn. 61; *Murray v. Interurban Street Railroad Company*, 102 NYS 1026. For contract situations see *Kizer v. Texarkana* 179 U.S. 199; *Shelley v. Hart* 297 P. 83, and *Eastman Kodak Company v. Blackmore* 277 Fed. 694; and pp. 102-3 of appellants' brief for Utah cases and other authorities.

The error of the Court below in applying applicable Federal law relating to the necessity for acquisition of an ICC permit resulted not only in depriving petitioners of a very important defense, it also made the State of Utah a condoner of respondent's disregard of the laws and policies of the United States. This is not a matter which "the States can regard or disregard at their will" and this Court has so held in a case quite analagous to the present one. *Sage v. Hampe* 235 U.S. 99 at Page 106.

While petitioners fully realize that this Court does not usually concern itself with questions of damages, here Section 303 of the Taft-Hartley Act, has, for the first time, been applied by the highest court of a state, and in a manner such as to produce an outrageous and unconscionable result and to establish a precedent which can have extreme consequences to the labor movement—consequences surely not contemplated by Congress. Only this Court can correct any error in the court below, and surely this Court cannot sanction the use of Section 303 as a vehicle for the award of damages made in the instant case.

It is respectfully submitted that serious and substantial questions of law under a Federal statute are here involved, requiring the intervention of this Court.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8823

DAIRY DISTRIBUTORS, INC.
PLAINTIFF AND RESPONDENT,

V.

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, ET AL.,
DEFENDANTS AND APPELLANTS.

HENROID, Justice:

Appeal from a judgment entered on a verdict in favor of plaintiff in a case having to do with Title 29, Sec. 187, United States Code Annotated (Sec. 303, Labor Management Relations Act; June 23, 1947, c. 120, Title III, Sec. 303, 61 Stat. 158).[1] Affirmed. Costs to plaintiff.

Defendants at some length have abstracted the evidence of the rather voluminous record. Understandably they have recited facts properly presentable to a jury that include those appearing most favorable to their own contentions. However, as we have indicated many times, in reviewing the facts in a case like this, we must do so in a light that most strongly supports the verdict, and we must go along with the verdict unless it clearly is not supported by any substantial evidence.

We believe the following to be a fair recital of such facts that the jury well may have believed to be true:

Prior to 1950, at Amalga, Utah, a co-operative association of milk producers, Cache Valley Dairymen's Association, managed by one Gossner, manufactured and distributed cheese over a wide area, including east and west coast points. Principal customer was Dorman & Co., New York

City. In 1950 the Utah-Idaho Central Railroad discontinued business, and as a result the Association lost its railhead. Use of other railroads made competition with Wisconsin cheese in the New York area prohibitive. Under our statutes and the Association's articles, it could not operate a transportation business. Without a back haul from the east, the Association could not have competed, with its own equipment, in the New York market. It was suggested, therefore, that Gossner form a trucking company, which he and his immediate family and one other did, incorporating the plaintiff, Dairy Distributors. This corporation purchased cheese from the Association, shipped and sold it to Dorman in New York, purchasing back haul commodities there (principally calcium chlorite) for resale here.

The Association and the Corporation were separate businesses, created for different purposes, and having different shareholders. The operations of each inured to the benefit of two different groups of people. Counsel for defendants seems to have conceded all this when, objecting

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[1] "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

to the introduction of a letter addressed to the Association, he observed that the Association was "not this Dairy Distributors at all—it is a different company."

The plaintiff Corporation had an annual $1,500,000 gross operation from September, 1952, to the latter part of July, 1955, enjoying a monthly profit of about $1,000, and acquiring assets of about $50,000. During this period, plaintiff constantly had one truck headed for Dorman's with a $12,000 cargo of perishable cheese, and one headed west with a back haul. Plaintiff had experienced no labor trouble whatsoever with defendants, although the Association had. Local 976 had been signatory to a contract with the Association, but upon its termination, negotiations for renewal at increased wages failed. Thereafter the union suspended all of its members working for the Association for failure to cooperate with the union. It later took the position such employees were no longer members of the union, as is reflected in the banner (see cut) employed on a picket line that proved to become a vital link in the chain of events culminating in this litigation.

Since the Association and the plaintiff Corporation were separate entities and businesses, the labor problems of the Association do not appear to us to be germane to the issues here, save as they constitute an historical, causative backdrop leading to the picketing of Dorman and plaintiff's equipment, resulting in the discontinuance of plaintiff's shipments to the former.

In May, 1955, one Rash, Secretary-Treasurer of Local 976, accompanied by one Ballew, troubleshooter loaned by a Seattle labor agency to assist Local 976 in its negotiations with the Association, went to New York to see one of the Dormans. They enlisted the aid of one Ristuccia, Secretary-Treasurer of New York Local Teamster Union 277 that represented Dorman's employees, in making the approach. The conceded purpose of the visit was to urge Dorman to pressure the Association into bargaining with Local

976, and in aid thereof to urge Dorman to refuse acceptance of any more cheese manufactured by the Association.

On July 26, 1955, a load of plaintiff's cheese arrived at Dorman's dock early in the morning, as did Local 976's representatives, Rash, Ballew and one Lott. Mr. Rosen, member of the New York Teamsters' Local and Dorman's foreman, having been advised that his union had sanctioned the picketing refused to unload the shipment. A picket banner appeared and Dorman's establishment and plaintiff's truck were picketed by Rash and Lott, and the cheese was not unloaded until five o'clock the same day. Dorman contacted Gossner in Utah and advised him that there was a picket line in front of his place of business picketing Dairy Distributors' truck, advising that his employees would not cross the picket line and did not want to unload the cheese.

The subjoined snapshot shows the picket banner and the wording used thereon.

Plaintiff shipped no more cheese to Dorman's until about six weeks later, on September 7, when Rosen told the driver the cheese could not be unloaded until the Dormans arrived. The Dormans advised him that the union would have to be contacted. Following such contact, he was told that the union would not permit the unloading. The cheese was not unloaded but was taken elsewhere and placed in storage.

Plaintiff made one more attempt to ship cheese to Dorman's about two months later, on October 31, 1955, when the plaintiff's equipment again was picketed. Plaintiff's truckdriver stated that the truck was unloaded "by Dormans and myself and a couple of the Dorman boys." Plaintiff made no effort thereafter to sell cheese to Dorman's but liquidated its trucking business, a result caused by the picketing and interference with plaintiff's business dealings with Dorman. It had been made clear that Dorman's place

of business and the plaintiff's equipment would be the subject of continued picketing whenever it was deemed advisable to foster the union's cause.

Under such circumstances it would not seem to be unreasonable for the jury to conclude that defendants, in violation of the act, induced and encouraged Dorman *and* its employees to refuse to use, process or otherwise handle or work on the commodities of the plaintiff with the objects of 1) forcing Dorman's to cease doing business with any other person and 2) forcing the Association to bargain with the union.

We think the believable facts in this case reasonably and successfully challenge the contentions of defendants' Point I and its subdivisions, which are to the effect that: Plaintiff failed to show the essential element making compensable a violation of the act; A. Because it 1) did not show an appeal to Dorman's nonsupervisory employees, 2) who, they say, were influenced only by their employers, 3) who, in turn were the only ones appealed to by the union; B. Because it failed to show a statutory object sought by the picketing; C. Although Local 976 was not certified as bargaining agent for the Association's employees, it enjoyed a status tantamount thereto; and D. Because it failed to show an unlawful attempt by defendants to accomplish a statutory object.

Touching on some of the subdivisions of Point I, we are not convinced by the arguments of counsel for defendants relating to an equivalence of certification in the light of the facts that 1) the union had suspended its members employed by the Association, for lack of cooperation with the union which now claims to be their bargaining agent; 2) the picket banner employed, itself negatived the idea that the union was bargaining agent by clearly branding the Association's employees as "non-union" (see cut); and anyway, 3) the union's activity was at the Dorman's place of business and alongside plaintiff's truck, certification as to the

Association's employees having nothing to do with the issues involved here.

To argue that certification or its equivalent had something to do with this case would be to assume that the Association, not the plaintiff, delivered the cheese to Dorman's in New York. The concession of defendants that the Association and the plaintiff Corporation were independent organizations, supported by substantial evidence in the record, does away with any such assumption and disposes not only of the defendants' suggestion to the contrary, but of any necessity to discuss ambulatory picketing and alter ego matters, or the authorities presented by either side in support thereof.

As to the matter of who was induced to act, we cannot agree with defendants that there was no evidence of any appeal or inducement directed to nonsupervisory employees to refuse to unload or handle the plaintiff's commodities, because the union representatives talked only to the Dormans and the foreman Rosen. To contend so is to challenge the silent potency of a peaceful picket line, and is to ignore the very purpose of such a line: Persuasion. It is to blind one elf to the words of the picket banner, with its pointed suggestion that loyal union members (Dorman's was a union establishment) should not handle the cheese. Further, it would seem to give little credit to the understanding and reaction of Dorman's union employees by intimating that only the conversations of Rash and the others with Dorman and Rosen, and not the presence of or the suggestiveness of the picket banner, had anything to do with the refusal to handle the cheese and the subsequent demise of a profitable business. The cold facts are that after enjoying congenial and profitable business relations with Dorman's for more than two years, with deliveries of cheese at lease once a week, the first picketing by the union agents ended all that, and in three and a half months thereafter plaintiff attempted but two shipments, the first being

refused, requiring storage, and the second being picketed. Coupled with these facts, Dorman had advised the Association that his men would not cross the picket line and did not want to unload the cheese. It is not reasonable to believe that this course of events would have occurred without the picketing, and it is difficult to understand why the union would engage in this picketing if it were not designed to appeal to and influence the employees. We believe the jury, contrary to the contentions of defendants, reasonably could have found that the picket line 1) *did* appeal to the employees, and that 2) the Dormans *were* expressing the feeling and intentions of the employees when they announced that their men would not cross the picket line and would not unload cheese processed by the Association, and 3) that because the employees indicated they would not cross the picket line, plaintiff's relations with Dorman's, as a practical matter, were terminated.

Defendants' Point II contends that the Western Conference of Teamsters is exempt from this litigation, not being a labor organization within the contemplation of Title 29, Sec. 152 (5) U.S.C.A.[2] There is evidence in the record to indicate that Western Conference of Teamsters had jurisdiction over local teamster unions in the 11 western states; the Local 976, of which Rash was an officer, was affiliated with the Western Conference, and that it in turn was affiliated with the International Union. Under such circumstances we cannot say that the Western Conference of Teamsters was not a lobar organization under the broad definition of the act.

The facts hereinabove mentioned, together with the facts that defendants' answer admitted that Local 976 of which

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[2] "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Rash was an officer and Joint Council 67 engaged in picketing, the trustees for Local 976 apparently was appointed by the International Union and that Local 976 members paid part of their dues to the International, seem to dispose of defendants' Points III and IV having to do with the contention that the Western Conference and the International were strangers to this action for lack of a principal-agent relationship. We think a factual issue was precipitated such that we cannot say as a matter of law no agency existed.

We are not unmindful of the administrative pronouncements cited by defendants relating to agency, nor the general proposition that agency must be shown by him who asserts it. We feel that a jury reasonably could have concluded that plaintiff sustained its burden of proving agency, and we choose to go along with plaintiff's cited authorities, insofar as the facts of the instant case are concerned, and also to assert that agency, provable circumstantially, has taken on a meaning under the Taft-Hartley Act, that includes ostensible authority, a matter not included within the Wagner Act.[3]

In the Ninth Circuit decision[4] involving the same legislation as we have here, the court, after referring to Title 29, Sec. 185 (e),[5] stated:

> "Probably the practical result of the section in the case of labor unions was to restore the general rules of agency, particularly the rules of apparent authority which had been curtailed by the Wagner Act . . . and the decision of the United Brotherhood of Carpenters . . . v. U. S., 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973.

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[3] 29 U.S.C.A. 151 et seq.

[4] International Longshoremen's, etc. Local 8 v. Hawaiian Pineapple Co. 226 F.2d 875.

[5] "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling (June 23, 1947, c. 120, Title III, #301, 61 Stat. 156.)"

We think the section was intended to cover the acts of officers of the union who deal with employers or with the public. That is, if a union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act then the union is responsible."

In United Mine Workers v. Patton,* it was said:

"The chief argument of defendants in support of their motion for directed verdict is that there is no evidence that they authorized or ratified the srtikes upon which plaintiffs rely for recovery. It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the Field Representative of the U.M.W., who was mployed by Dist. 28, and that he was engaged in the organization work that was being carried on by the international union through Dist. 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organizational work the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment (citing cases)."

Points V through IX claim error in failing to grant motions for directed verdict at various stages of the proceedings, because 1) any evidence of damage was so speculative as not to support the verdict, 2) plaintiff had no contract with the Association or Dorman's, 3) there was no evidence that Dorman's refused to purchase cheese because of the picketing, 4) Dorman's were willing to continue said purchases, and 5) because plaintiff's hauling business was an unlicensed interstate operation. All of these contentions, except 2) are supported by evidence to the contrary which

*211 F.2d 742.

the jury could have resolved and did resolve in favor of the plaintiff, which conclusions we are not constrained to upset.

As to plaintiff having no contract for any definite time with the Association or Dorman, we know of no authority that wil preclude recovery of damages in a tort action because there is no such contract. Besides, there had been continuous contractual sales and purchases between plaintiff and Dorman's for better than two years. The evidence shows that the Dormans wanted deliveries and plaintiff wanted to continue to make them, and it appears that such an extended business relationship at least presumptively would have prevailed indefinitely had it not been for the unauthorized picketing.

As to Point X which claims error in rejecting an affidavit by one Corbett having to do with plaintiff's relationship with the Association (which affidavit was filed after the trial), the facts recited therein were available to defendants during the trial by way of discovery or otherwise and there is no showing made of their nonavailability.

Point XI complains that the court erred in sustaining an objection to testimony that wages were less in another area than those paid by the Association. We can see no relevancy in such testimony as it might bear on an unlawful picketing situation between the union and the plaintiff, not the Association.

We believe the remaining points are not well taken: One having to do with admission of a letter requested to be produced by defendants, because it appears to have materiality in support of plaintiff's claim of union interference; another having to do with the introduction in evidence of an audit, because it appears to have been received without objection; and the last having to do with the contention that it was error not to have granted a new trial, because we fail to find any reasons stated therein warranting the granting thereof under our rules,[1] and defendants have failed to

[1] Rule 59, Utah Rules of Civil Procedure.

point out any of the grounds under said rules that would justify the granting thereof.

WE CONCUR:

.....

ROGER I. MCDONOUGH, *Chief Justice*

.....

LESTER A. WADE, *Justice*

CROCKETT and WORTHEN, JJ. concur in results.

APPENDIX B

REDIRECT EXAMINATION (R116)

BY MR. HANSON:

Q. Do I understand you to say, Mr. Rash, when you went back to New York in May 1955, May 31st, I think it was, that there were none of the employees of Cache Valley Dairy Distributors, or Cache Valley Dairy Association that belonged to the Teamsters Union? A. Well now, they were not paying dues, I will put it that way.

Q. Well, did they belong to it or not? A. They had never been decertified, we still have a contract covering it in this State, it is legal.

Q. Can you tell me whether or not any members of the Cache Valley Dairy's members do? A. No dues paying members, I would say we represented them.

Q. Why did you carry this sign around back there, were you certain this cheese was carried and delivered by this truck has been processed by non-Union employees? A. They were not due paying members.

Q. You didn't say "no dues paying members" at that time, you advertised they were non-Union people back in New York? A. I imagine they are non-Union if they don't pay dues.

Q. Now, you recognize 976 is what is called a Local Union? A. Yes.

Q. You are part of Joint Council 67? A. We are affiliated with Joint Council 67.

Q. And Joint Council 67 is part of the Teamsters Western Conference of Teamsters? A. I don't know about it.

Q. You don't know about them? A. No sir.

Q. Is it affiliated with the Western Conference of Teamsters? A. No sir.

Q. It is a separate entity? A. No—that I don't know. —not that I know.

Q. Could you be wrong on that? A. I don't believe so.

Q. As far as labor charges against Mr. Gosner, you say they are brought to the National Labor Relations Board against Cache Valley Dairy? A. Cache Valley Dairy Association and Edwin Gossner.

Q. That is before 1952? A. The hearing was held after.

Q. The charges were brought in 1952? A. It could be the early part of 1952, it was before I went there in, September 1952.

Q. Your contract with Cache Valley Dairy ran out what year? A. I don't believe it ever ran out until he canceled it out. He canceled it out in 1953 if I am not mistaken.

Q. And at the time you went back to New York, is it your contention Number 976 had been certified by the National Labor Relations Board as bargaining agent for those employees or not? A. We were recognized bargaining agent by his signed contract before.

Q. Had you been certified by the National Labor Relations Board when you went back to New York? A. It wasn't necessary.

Q. Answer "yes" or "no": Had you been certified by the National Labor Relations Board when you went back to New York on May 31st, 1955. A. No.

Q. And have you been certified, your organization been certified as bargaining agent of the employees of the Dairy Distributors when you went back to New York on May 31st, 1955? A. The same answer, "no".

Q. Have you ever had a contract with any of the employees of Dairy Distributors when you went back to New York in May of 1955? A. Before that?

Q. With the employees of Dairy Distributors? A. Before 1955?

Q. Yes? A. Some of the employees that drove Dairy Distributors trucks were Union members before—in 1952.

Q. That isn't what I asked you.

I asked you whether you had a contract with Dairy Distributors before 1955, or at any time? A. No. We didn't know there was any difference between them and Cache Valley Dairy Association, then.

Q. May I have the court's indulgence just a minute.

THE COURT: It is almost noon, perhaps you may exercise your indulgence through the noon hour. Members of the jury, the court will be in recess until 2:00 o'clock P. M.

(Thereupon the court admonishes the jury and a recess is taken until 2:00 o'clock P. M.).

NOON RECESS

2:00 o'clock P. M.
Hearing resumed.

THE COURT: The record may show the jury is present, counsel and the parties are here.

In view of the check which the court made in the record, the objection to Exhibit P-4,—is that the one we took under advisement—will be sustained.

I believe you had asked, Mr. Hanson, for a few moments time to consider a few other questions.

MR. HANSON: I have one or two questions I would like to ask Mr. Rash.

MILO B. RASH

is recalled as a witness for

FURTHER REDIRECT EXAMINATION

BY MR. HANSON:

Q. Mr. Rash, I wasn't entirely clear on one aspect this morning. As I understand, you are an officer of Joint Council 67? A. Yes sir.

Q. And Local 976 are you an officer in that? A. Yes sir.

Q. You are secretary-treasurer of Local 976? A. Yes sir.

Q. That is a Teamsters Local Union in Logan, Utah? A. Northern Utah.

Q. Northern Utah--thank you.

Can you tell me whether or not 976 is a trusteeship or receivership, what it is? A. It is a trusteeship.

Q. It is under a trusteeship? A. Yes.

Q. Who is the trustee of Local 976? A. John M. Annan.

Q. Where does he have his business office, where does he hold forth? A. Los Angeles.

Q. Who appoints him? A. That I wouldn't know.

Q. You say he is the trustee? A. Yes sir.

Q. And do you know whether or not he is elected to that position?

MR. BECK: Just a minute, I object to that, it being incompetent. I don't particularly have any objection to the subject matter, I don't see the relevancy of it at this time.

MR. HANSON: I think I can connect it.

THE COURT: The objection is overruled.

Q. (By Mr. Hanson). Is he elected to that position, or is it appointive? A. I am not sure, I think it is appointive.

Q. Do you know whether or not he is appointed by the President of the International Union; by Mr. Beck or Mr. Hoffa? A. I don't know.

Q. By that you mean you don't know? A. Yes sir.

Q. Is it possible he could be appointed by whatever gentleman is president of the International Union? A. I think it is the Executive Board of the International Union.

Q. The President of the International Union at this time, is it Mr. Hoffa or Mr. Beck, which one is it now? A. Mr. Beck.

Q. Is he on the Executive Board? A. To my best knowledge he is.

Q. And then Jack Annan of Los Angeles is the trustee for Local 976? A. Yes sir.

MR. HANSON: One moment Your Honor—

Q. (By Mr. Hanson). Can you tell us, Mr. Rash, what Mr. Annan's responsibility is or what connection he had—not his connection—but what are his duties relative to 976, what are his duties? A. That is a good question—he never has been in Ogden, Utah since he has been a trustee.

Q. Has he communicated with you? A. I don't believe I had ever had a letter.

Q. You don't know what his duties are, except you know he is a trustee of the Union? A. That is my understanding, yes.

Q. You pay dues to the International Union, do you not? A. No sir, I pay dues in 976.

Q. Does 976 pay part of those dues over to the International Union? A. Per capita tax.

Q. By that it means for each member so much per capita tax is paid to the International Union? A. To my knowledge all organizations are set up that way.

Q. I have one further question, Mr. Rash, do you know whether or not the trustee of the Local Union, is he the one that handles the funds, pays the bills, and that sort of thing? A. No sir.

Q. You know he is a trustee? A. That is my understanding, he is a trustee.

Q. And the Local Union receivership is under him?

MR. BECK: He said it wasn't in receivership.

Q. (By Mr. Hanson). Or trusteeship? A. Trusteeship.

Q. Trusteeship? A. Yes sir.

MR. HANSON: That is all, Your Honor.

RECROSS EXAMINATION

BY MR. BECK:

Q. John M. Annan is President of General Council 42, isn't he? A. Yes sir.

MR. ELIAS HANSEN: I advised Mr. Beck the practice is to stand up, is that right?

THE COURT: It is not necessary to stand while examining witnesses unless you desire to, the court feels it is tending to shorten examinations, but stand when addressing the Court, I think that witnesses may be examined when you are seated.

MR. ELIAS HANSEN: I thought that is the rule.

MR. BECK: Judge Hansen called me down about the fifth time.

Q. (By Mr. Beck). Mr. Rash, John M. Annan is President of Joint Council 42? A. Yes sir.

Q. As far as you know he never has been in Ogden in his life? A. Not that I know of, sir.

Q. You hold membership meetings, your pay your bills, and you collect your dues, and you negotiate your contract autonomously from your own Local Union at headquarters in Ogden? A. Yes.

Q. Every contract signed is signed by the secretary of the Union, by Milo B. Rash? A. Yes sir.

Q. And the contracts had with Mr. Gossner back in 1947 were signed by the secretary of the Union? A. Yes.

Q. And the contracts had with Mr. Gossner back in 1947 were signed by the secretary of the Union? A. Yes.

Q. Mr. Annan's name was not on any of them? A. No.

Q. How much is paid? A. Forty cents per member per month.

Q. And every Local Union in the United States, Canada, and Hawaii, and Puerto Rico and everywhere else does the same? A. Yes, no difference.

Q. Likewise you pay per capita tax into Western Dairy Council. A. Yes sir.

Q. John M. Annan, or nobody else, fixes those dues except the International which you decide to pay in Ogden? A. Correct.

Q. So far as you know, Local Union 976 is completely an autonomous organization? A. Correct.

Q. And is wholly independent of 277 in New York? A. Yes.

Q. And wholly independent of Joint Council 42 in Los Angeles? A. Yes.

Q. And wholly independent from any other organization?

MR. HANSON: We object. He stated he doesn't know who appoints Mr. Annan, that is a fact for the jury to decide. I object, it is calling for conclusion and from his own testimony he isn't warranted to give an answer to the question.

THE COURT: The objection is overruled.

A. Yes.

Q. (By Mr. Beck). Now, Mr. Rash, is the Western Conference of Teamsters a Labor Union? A. Not as such, no.

Q. Do you have any control over it? A. No sir.

Q. Does it have any control over you? A. No sir.

Q. You stated to adversary counsel, Mr. Ballew accompanied you to New York? A. Yes sir.

Q. Was he on your pay roll, 976? A. No sir.

Q. How did you come to get Mr. Ballew to go with you to New York? A. Mr. Ballew is an employee of Western Dairy Employees and he was loaned to our local Union under my direction to help in this matter.

Q. He was working and whatever he did was exclusively under your jurisdiction? A. Yes sir.

Q. And direction? A. Yes sir.

Q. Now, Mr. Rash, I specifically invite your attention to the period between July 28th-July 25th, 1955 and the 19th day of November 1905 and ask you—1955, or, yes, 1955, and ask you if you know whether or not any trucks carrying Cache Valley cheese for Mr. Gossner or Dairy Distributors was refused at the docks of the Dorman and Company in New York? A. Not to my knowledge.

Q. I will ask you if there was regular and frequent communication by way of Dairy Distributors, the plaintiff here, between carrying Swiss cheese at the Cache Valley Dairy at Amalga, Cache Valley, Utah and at the Dorman docks at Manhattan, New York? A. I don't know how many, there were trucks leaving for Dorman and Company, that went to Dorman and Company after July 27th.

Q. They continued down to what time? A. Well now, I wouldn't be able to tell for certain how long they continued—but I wouldn't say for sure.

Q. Now, do you know whether or not the so-called Dairy Distributor tractors, so called, and trailer were intermixed? A. Yes sir.

Q. Were they? A. Yes sir.

Q. Do you know whether or not the employees of Cache Valley Dairy worked part time for Dairy Distributors and vice versa? A. Yes sir.

MR. BECK: That is all.

REDIRECT EXAMINATION

BY MR. HANSON:

Q. Mr. Rash, did I understand you to say Mr. Ballew was sent here to Utah to assist you in your problem? A. Yes sir.

Q. And he was—where did he come from? A. The office of the Western States Dairy Employees Council, it is at Seattle, Washington.

Q. Is that a division of the Western Conference of Teamsters? A. It is not the Western Council of Teamsters, I don't believe. It is a separate division that the local Unions that have members working in the dairy industry pay a per capita tax on the members, they have in the dairy industry, into Western States Dairy Employment Council.

Q. Does Western Teamsters have other employees

except Western dairies? A. It is a warehouse council, automotive council, over the road council.

Q. And do you have other councils it employees? A. There are other councils.

Q. The Western Conference of Teamsters has jurisdiction over what States? A. Eleven States, the Western Council of Teamsters is comprised of Local Unions in the eleven Western States.

FILE COPY

No. 856

BRIEF OF RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

DAIRY DISTRIBUTORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF OF RESPONDENT IN OPPOSITION

HANSON, BALDWIN & ALLEN
WALTER L. BUDGE
Salt Lake City, Utah

Counsel for Respondent

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OPINION BELOW

The opinion in this case of the Supreme Court of Utah is found at 329 P.2d 414 and a copy of the opinion appears in the Appendix to the Brief of the Petitioners. A petition for rehearing in this matter was denied by the Supreme Court of Utah on January 26, 1959.

JURISDICTION

The petitioners attempt to invoke the jurisdiction of this court upon the provisions of Title 28, Section 1257 (3) of the United States Code and upon the assertion that the court below improperly construed and applied various sections of the Labor Management Relations Act of 1947, and particularly Sections 301(e) and 303.

It is the claim of the respondent that the only portion of Title 28, Section 1257(3), United States Code, which has any applicability is that portion of Subsection 3 which relates to the situation where any title, right, privilege or immunity is specially set up or claimed under the Constitution. No other portion of Section 1257 has any applicability to this case. It is the contention of the respondent that no federal or constitutional question is properly framed under Subsection 3 of Section 1257, United States Code. This contention of the respondent will be more fully treated herein in the Argument.

The respondent further contends that the court below did not improperly apply or construe any of the sections of the Labor Management Relations Act of 1947 relied upon by the petitioners, but on the contrary applied the sections of that act involved in accordance with the constructions and applications given it by the federal circuit courts and by this court. A more complete statement of this contention will also appear in the Argument.

QUESTIONS PRESENTED

1. Whether the picketing complained of by the plaintiff below and respondent here had any effect on the re-

fusal of Dorman's employees to unload and receive the product of the respondent?

It is clear from the testimony of witnesses for the respondent, Fred Rico and Gywellskog, that Dorman's employees refused to unload cheese and that these refusals extended in time from July 26, 1955, through September 7, 1955. (Tr. 151-171)

It further appears from the testimony of Victor Dorman that he told the respondent Gossner that "our employees don't want to unload any more Dairy Distributors' cheese. Don't send any more with Dairy Distributors' trucks." (Tr. 89)

There was a concerted refusal on the part of Dorman's employees to handle Cache Valley Association cheese; and the employees were induced by the picketing efforts of Rash and Ballew and nothing else because the Dormans wanted the cheese and had never told their employees not to unload it. (Tr. 272, 273)

2. Whether the International Union and the Western Conference can escape the consequences of the acts of their agents by now denying agency?

3. Whether the claim of violation of the due process clause of the United States Constitution has been raised properly in any proceeding in the courts below or has been properly framed in this Petition for a Writ of Certiorari.

STATUTES INVOLVED

Section 303 of the Labor Management Relations Act, designated as Title 29, Section 187, U.S.C.A.:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affect-

ing commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object there of is —

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having the jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title III, Para. 303, 61 Stat. 158."

Title 29, Section 185(e), U.S.C.A., which reads as follows:

"For the purpose of this section and in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether

the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF FACTS

At the ouset it must be remembered that Dairy Distributors, Inc., plaintiff and respondent in the court below, was a separate corporate entity entirely set apart from the Cache Valley Dairying Association or any other business enterprise. (Tr. 66) The defendants and appellants in the court below and your petitioners here at no time were a "bargaining authority" or in any capacity representative of the employees of Dairy Distributors, Inc., for any purpose. (Tr. 118, 119)

With this material truth in mind, we state the facts. The incorporators and stockholders of Dairy Distributors, Inc. were Edwin Gossner, his wife, his son Edwin, Jr., his daughter Delores and one Arnie Hansen (Tr. 13). These people formed this closed corporation in September of 1952 (Tr. 12). The executive board of the Cache Valley Dairymen's Association had declined to go into the trucking business (Tr. 11). Dairy Distributors purchased the necessary motorized equipment and employed the necessary personnel to carry on the trucking operation (Tr. 14-15). The net profit for the years 1953, 1954 and the first half of 1955 averaged $1,000.00 per month (Tr. 29).

Dairy Distributors' principal source of income was from business transacted with Dorman and Company of New York City (Tr. 16). On or about July 27th of 1955, Dorman advised Dairy Distributors that there was a picket line in front of the Dorman establishment and that Dorman employees would not cross the picket line and did not want

to unload the cheese from Dairy Distributors' truck (Tr. 16). See Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15. The picketing signs read:

NOTICE

The Cheese *Carried and Delivered*

By This Truck Has Been Worked

Processed By

NON-UNION

EMPLOYEES

of the *Cache Valley Dairymens*

Assoc. Smithfield, Utah

Teamsters Joint Council No. 67

Plaintiff's Exhibit No. 13 (Emphasis added).

From that time on Dairy Distributors' business was disrupted (Tr. 17); they made but two more shipments of cheese to New York, one in September and another in October. Normally Dairy Distributors had two trucks on the road steadily, one going east and one returning to the west (Tr. 15). There had never previously been a dispute between Dairy Distributors, or the Dairy Distributors' employees, and the Teamsters Union (Tr. 21, 22). The union had attempted to secure recognition as the representative of the employees of Cache Valley Dairymens Association (Tr. 22).

Dairy Distributors, Inc. had encountered no labor difficulties; the record shows:

> Q. The reason you went out of business was because of the picketing difficulties?
>
> A. The Dairy cheese picketing in New York.
>
> Q. The sole reason you went out of business was because you had serious labor difficulties?
>
> A. Dairy Distributors had no labor difficulties to my knowledge.
>
> Q. Who did have the difficulties, why did you go out of business then?
>
> A. On account of the cheese couldn't be handled any more by Dairy Distributors. The employees didn't give me any trouble, — had no labor trouble.
>
> Q. The reason you did go out of business was because of labor difficulties as I get it?
>
> A. Because of picketing. (Tr. 40).

Dairy Distributors' business had been a profitable one until interferences therewith by your petitioners. Paul B. Tanner, Certified Public Accountant, was auditor for Dairy Distributors (Tr. 68, 69). The corporation audits were admitted in evidence (Tr. 71). The books and audits show the corporation's operation to have been a profitable one. When the books were closed the assets were $56,131.00 as against liabilities of $6,808.71 (Tr. 224).

The record discloses that prior to 1950, at Amalga, Utah, a cooperative association of milk producers, Cache Valley Dairymen's Association, managed by one Gossner, manufactured and distributed cheese over a wide area, including east and west coast points. Principal customer was Dorman & Co., New York City. In 1950 the Utah-Idaho

Central Railroad discontinued business, and as a result the association lost its railhead. Use of other railroads made competition with Wisconsin cheese in the New York area prohibitive. Under Utah statutes and the association's articles, it could not operate a transportation business. Without a back haul from the east, the association could not have competed, with its own equipment, in the New York market. Gossner formed a trucking company, with his immediate family and one other, incorporating the plaintiff, Dairy Distributors. This corporation purchased cheese from the association, shipped and sold it to Dorman in New York, purchasing back haul commodities there (principally calcium chlorite) for resale in Utah.

Dairy Distributors' corporation had an annual $1,500,000 gross operation from September, 1952, to the latter part of July, 1955, enjoying a monthly profit of about $1,000. During this period, Dairy Distributors constantly had one truck headed for Dorman's with a $12,000 cargo of perishable cheese, and one headed west with a back haul. Local 976 had been signatory to a contract with the association, but upon its termination, negotiations for renewal at increased wages failed. Thereafter the union suspended all of its members working for the association for failure to cooperate with the union. It later took the position such employees were no longer members of the union, as was reflected in the banner employed on the picket line that proved to become a vital link in the chain of events culminating in this litigation.

In May, 1955, one Rash, Secretary-Treasurer of Local 976, accompanied by one Ballew, troubleshooter loaned by a Seattle labor agency to assist Local 976 in its negotiations

with the association, went to New York to see one of the Dormans. They enlisted the aid of one Ristuccia, Secretary-Treasurer of New York Local Teamster Union 277 that represented Dorman's employees, in making the approach. The conceded purpose of the visit was to urge Dorman to pressure the association into bargaining with Local 976, and in aid thereof to urge Dorman to refuse acceptance of any more cheese manufactured by the association. (Tr. 111).

On July 26, 1955, a load of Dairy Distributors' cheese arrived at Dorman's dock early in the morning, as did Local 976's representatives, Rash, Ballew and one Lott. Mr. Rosen, member of the New York Teamsters' Local and Dorman's foreman, having been advised that his union had sanctioned the picketing refused to unload the shipment. A picket banner appeared and Dorman's establishment and Dairy Distributors' truck was picketed by Rash and Lott, and the cheese was not unloaded until five o'clock the same day. Dorman contacted Gossner in Utah and advised him that there was a picket line in front of his place of business picketing Dairy Distributors' truck, advising that his employees would not cross the picket line and did not want to unload the cheese.

Dairy Distributors shipped no more cheese to Dorman's until about six weeks later, on September 7, when Rosen told the driver the cheese could not be unloaded until the Dormans arrived. The Dormans advised him that the union would have to be contacted. Following such contact, he was told that the union would not permit the unloading. The cheese was not unloaded but was taken elsewhere and placed in storage.

Dairy Distributors made one more attempt to ship cheese to Dorman's about two months later, on October 31, 1955, when the Dairy Distributors' equipment again was picketed. Dairy Distributors made no effort thereafter to sell cheese to Dorman's but liquidated its trucking business, a result caused by the picketing and interference with Dairy Distributors' business dealings with Dorman. It had been made clear that Dorman's place of business and the Dairy Distributors' equipment would be the subject of continued picketing whenever it was deemed advisable to foster the union's cause. So speaks the record and the court below considered thus the facts.

ARGUMENT

a. There is no erroneous application or construction of any federal statute by the court below.

The petitioners attempt to avoid liability for the International Union and the Western Conference by contending that the active participants in the picketing were not their representatives or agents.

It is clear from the record that both the Western Conference and the International Union were by these persons connected with the activity which is complained of in this action (Tr. 141-143).

In this connection we cite again Title 29, Section 185(e) which reads:

> "For the purposes of this section in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question whether the specific acts

performed were actually authorized or subsequently ratified shall not be controlling."

The petitioners contend that because the specific acts were neither ratified nor authorized directly by the International Union, or an officer thereof, the International Union and the Western Conference are not liable.

We invite attention to the case of *International Longshoremen's and Warehousemen's Local No. 8 v. Hawaiian Pineapple Company et al.*, a Ninth Circuit Court decision reported at 226 Fed. 2d 875.

In that decision the court refers to the section above quoted and uses this language:

> "We think the section was intended to cover the acts of the officers of the Union who deal with employers or with the public. That is, if a Union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act, then the Union is responsible."

In this connection also we refer to the case of *United Mine Workers of America v. Patton*, 211 Fed. 2d 742, a decision of the Circuit Court of Appeals for the Fourth Circuit. This opinion contains the following discussion of the question of agency here raised by the applicants for the writ.

> "The chief argument of defendants in support of their motion for directed verdict is that there is no evidence that they authorized or ratified the strikes upon which plaintiffs rely for recovery. It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the

> Field Representative of the United Mine Workers, who was employed by District 28, and that he was engaged in the organization work that was being carried on by the international union through District 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organizational work in the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment. Stockwell v. United States, 13 Wall. 531, 545-548, 20 L. Ed. 491; Hindman v. First Nat. Bk. of Louisville, 6 Cir., 112 F. 931, 57 L.R.A. 108; Oman v. United States, 10 Cir., 179 F.2d 738; United States v. Waters, 7 Cir., 194 F.2d 866; Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E. 2d 198; 2 Am. Jur. 279."

Defendants' answer in this cause admits that Local 976 of which Rash was an officer and Joint Council 67 engaged in picketing; the trustee for Local 976 was appointed by the executive board of the International Union and Local 976 members paid part of their dues to the International. These facts dispose of defendants' argument having to do with the contention that the Western Conference and the International were strangers to this action for lack of a principal-agent relationship. It cannot be said as a matter of law that no agency existed. (R. 121-123)

b. The petitioners presented for the first time the question of remote and speculative damages in their petition for rehearing before the Supreme Court of Utah. No

question was ever raised either in the record at the trial or in the briefs or arguments before the Supreme Court when the matter was originally heard by the Supreme Court of Utah. The question of whether the damages awarded based upon the verdict are remote and speculative has now been raised practically for the first time before this court.

The books and records of the respondent were introduced in evidence together with an accounting summary (Exhibit P. 16, Tr. 339). It appears that from an examination of the transcript and this exhibit, together with the other testimony relating thereto, that the damages assessed were not based upon speculation but upon competent evidence properly admitted at the trial and not objected to by the petitioners.

In this connection the court's attention is invited again to the case of *United Mine Workers of America v. Patton*, 211 Fed. 2d 742.

That opinion contains the following language with respect to the propriety of a judgment based upon a verdict in face of the claim that the damages were remote and speculative:

> "Another argument is that no damage has been shown because it is said that the three year lease had not been delivered and future profits of the business which plaintiffs were forced to abandon were purely speculative. We think, however, that the evidence sufficiently showed that plaintiffs had established a profitable business under the arrangement they had with Clinchfield, and that irrespective of the [illegible] year lease a sufficient basis had been laid for [illegible]ard of damages. As said by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct.

248, 250, 75 L. Ed. 544, a tort case arising under the Sherman Act:

> 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.'

"See also Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and Polar Steamship Corp. v. Inland Overseas Steamship Corp., 4 Cir., 136 F. 2d 835."

c. The petitioners contend that a statute involving the Interstate Commerce Commission was improperly or inaccurately construed or applied by the court below. The only reference to this is found on Page 3 of the Petitioners' Brief which says as follows:

> "The court wrongfully applied Federal law under the Interstate Commerce Commission Act, thereby depriving petitioners of the defense that the respondent illegally operated without an I.C.C. permit and could not recover the loss of future profits."

This is the only reference to the Interstate Commerce Commission Act which appears any place in the petitioners'

statement. No specific section is invoked or quoted, either in the petitioners' brief herein, and no specific quotation or reference to any section of the act was ever raised at any stage of the proceedings below.

d. No federal or constitutional question is properly framed by petitioners under Title 28, Subsection 3 of Section 1257, U. S. Code,

Section 1257 provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Your petitioners do not here question the validity of the federal statute; they say simply that: "The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257(3), the court below having improperly construed and applied various sections of the Labor-Management Relations Act of 1947 and particularly Sections 301(3) and 303 thereof, (61 Stat. 136, 29 U.S.C., § 151, et seq.) in a manner such as to deprive petitioners of rights protected under such statute and under the Federal Constitution • • • " (Petition, pages 1 and 2.)

Thereafter, in petitioners' application for certiorari inferences are made to a deprivation of property without due process of law and questions are argued to this court based upon questions of fact presented to the court below. Ordinarily this court will not exert its jurisdiction merely to review a decision of the state court upon a question of fact. And once a case is otherwise before it, the court generally will not reexamine the state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358; *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. The record in this cause does not show that the state court rendered a decision in a federal question of substance that had not before been determined by this court, or that the decision of the state court was not in accord with applicable decisions of this court. Nor will the record sustain petitioners' contention (1) that there was a lack of agency shown; (2) that there was but a single picketing; (3) that the picketing did not induce Dorman's employees to refuse to unload the cheese; (4) that the picketing was not the cause of the discontinuance of respondent's business; (5) or that the damages assessed were remote, speculative or excessive.

CONCLUSION

Jurisdiction in this cause should not be invoked; certiorari should be denied.

Respectfully submitted,

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